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Supreme Court, U.S.
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Supreme Court, U.S.

In The Supreme Court of The United States

J.W.,
Petitioner,
v.

THE HONORABLE DAVID W. KNIGHT,
IN HIS OFFICIAL CAPACITY AS SENIOR STATUS JUDGE,
CIRCUIT COURT OF MERCER COUNTY FOR THE
STATE OF WEST VIRGINIA,
Respondent.

JASON WILSON,
REAL PARTY IN INTEREST

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it violates the Supremacy Clause for a state court to order a minor rape victim to submit to a penetrating pelvic examination, where the court lacks constitutional authority to issue such an order and the minor victim has a federal constitutional right to refuse to submit?

II. Whether it violates the Due Process Clause for a state court to order a child rape victim to submit to a penetrating pelvic examination at the behest of a criminal defendant?

PARTIES TO THE PROCEEDINGS

Petitioner J.W. is a crime victim and minor resident of the state of West Virginia. Respondent David W. Knight is a Justice of the Circuit Court of Mercer County for the state of West Virginia. Jason Wilson is a criminal defendant who stands charged in the Circuit Court of Mercer County with multiple sexual crimes against Petitioner.

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Petitioner J.W. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals for the State of West Virginia.

OPINION AND JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion and judgment of the Supreme Court of Appeals for the State of West Virginia is reprinted at App.1a-14a and is published at *State ex rel. J.W. v. Knight*, 2009 W.Va. LEXIS 36 (2009).

The Orders and Decrees of the Circuit Court Judge are reprinted at App.50a-53a, and are not otherwise published.

JURISDICTION

The Supreme Court of Appeals for the State of West Virginia rendered its decision on May 14, 2009. The State, on behalf of Petitioner, did not seek rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law."

The Supremacy Clause of the United States Constitution provides in pertinent part:

"This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

The Fourth Amendment to the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons...shall not be violated..."

STATEMENT OF THE CASE

Introduction/Summary of Argument

This case raises a profoundly important and unprecedented issue regarding the authority of state courts in criminal trials to issue pre-trial discovery orders that impose on the federal constitutional rights of crime victims. In particular, this case asks whether a state trial court, at the behest of the accused, has authority to compel Petitioner, a minor rape victim, to submit to a penetrating pelvic examination for the purpose of determining the condition of her hymen. The trial court ordered Petitioner to submit even though there had been a delay of several years from the time the sexual abuse

ended and when it was reported to law enforcement, the defendant confessed to digital penetration, and research shows that hymenal damage is almost never present in adolescents who report sexual penetration, unless it is reported soon after the penetrating event. (App.45a and n.20).

The Supreme Court of Appeals for the State of West Virginia upheld the trial court's order, though it never articulated the source of its authority beyond a citation to a West Virginia case, *State v. Delaney*, 187 W.Va. 212 (1992) that established a multi-part test to "balance" a defendant's request for a physical or psychological examination against the risk of harm to the victim. *Delaney* effectively held that the accused has a right to request that a victim be physically examined at the behest of the accused, but aside from a passing reference to the defendant's "due process" rights, cites no constitutional basis for its ruling. *Delaney* 187 W.Va., at 214. Nor does the *Delaney* court make any reference to the Due Process liberty interests and federal constitutional rights of victims to be free from an unwanted sexual intrusion by the court.[1] (see argument *infra* at pp 14-17).

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[1] Although not a "party" to the criminal case, Petitioner certainly has standing to assert her Due Process rights here because the prohibition against government restraint on civil liberties extends to court orders, whether initiated by the court itself, *Berner v. Delahanty*, 129 F.3d 20 (1st Cir. 1997) (attorney filed §1983 action against state court criminal judge to seek of his right to wear a particular pin during court proceedings), or at the behest of a private person. *Shelley v. Kraemer*, 334 U.S. 1, (1948) (deeming "long [ ]established" the proposition that the actions of state courts and judicial officers in their official capacities constitute state action, even if issued on behalf of private persons); see also *Board of Education v. Barnette*, 319

Like the court in *Delaney*, the court below cites no constitutional authority on the side of the accused, and fails to acknowledge Petitioner's various liberty interests and federal constitutional rights at stake in this controversy. Had the court properly framed the issue, it might have realized that where a defendant can cite only a state common law right in support of his request to violate the federal constitutional rights of another, a court may not "balance" the federal rights at stake, but must "disregard" state law altogether. *Cooper v. Aaron*, 358 U.S. 1 (1958). *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816) (it is "imperative upon the state judges" that they enforce federal law); *Claflin v. Houseman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa v. Katt*, 330 U.S. 386 (1947). Even if the defendant's rights here were somehow vested in the West Virginia state constitution, the supremacy of federal law would require summary denial of his request. *Malloy v. Hogan*, 84 S.Ct. 1489, 1493-1494 (1964) (while state constitutional rights can exceed those provided under federal constitutional law, they cannot be interpreted so as to violate another person's federal constitutional rights).

The ruling below also violates Petitioner's Due Process rights because there can be no government encroachment of a fundamental liberty interest in the absence of a compelling state interest, and the

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U.S. 624 (1943); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587 (1926). *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964).

court below cited no such interest here, nor could it have responsibly done so.

This case has captured the attention of prosecutors across the country because of the potential impact of the lower court's decision on the integrity of criminal trials, in particular, the ability of prosecutors effectively to redress sexual crimes and sexual abuse of children, a social problem of such magnitude it is estimated that many millions of children each year are victimized. Bolen, R. and Russell, D., The Epidemic of Rape and Child Sexual Abuse in the United States, Sage Publications, 2000 (at p.211, citing data showing 40% of adults report being sexually victimized as children, which translates into an annual incidence rate in the many millions).

It is also noteworthy that states are widely divergent on the principles underlying the issues presented here, primarily because of confusion as to whether this Court's rulings in *Chambers v. Mississippi*, 410 U.S. 284, 294, (1973), *Brady v. Maryland*, 373 U.S. 82 (1963) and *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), created for criminal defendants a federal Due Process right to compel pretrial disclosure or "discovery" of personal and even privileged information in the exclusive custody of private third-parties.

Brady nowhere authorizes a criminal defendant to obtain discovery of information in the exclusive custody of private third-parties, much less subject them to intrusive pelvic examinations. To the contrary, *Brady* involved a defense request for government evidence in the custody of the prosecution. Likewise, *Ritchie* dealt with a

defendant's request for the investigative files of a government agency, which files pertained specifically to the investigation of criminal charges against Ritchie. And *Chambers*, though it affords the defendant a compulsory process/fair trial right to present witnesses in his own behalf, nowhere authorizes the accused to seek pretrial disclosure of information directly from those witnesses, or from any private third-party.

This Court was clear in all three cases that the Due Process rights of an accused criminal exist as against the state, and thus compel disclosure of information only to the extent it is in the custody or control of an agent of the prosecution. *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998) ("failure to show that the records a defendant seeks are in the government's possession is fatal to a Ritchie claim"); *United States v. Skorniak*, 59 F.3d 750, 755-56 (8th Cir. 1995) (defendant not entitled to issue subpoena for witness' medical records because the government was under no obligation to seek out potentially exculpatory evidence); *United States v. Hall*, 171 F.3d 1133 (8th Cir. 1999) (defendant not entitled to compulsory disclosure of medical and psychiatric records of a witness because "the government has no obligation to obtain for a defendant records that it does not already have in its possession or control").

This important limitation on Due Process notwithstanding, the defendant below relied on *Brady* as a constitutional source of support for his state law request under *Delaney*. He repeatedly cited *Brady* (App.29a, 32a), and included in his brief to the West Virginia Supreme Court of Appeals, a major argument heading entitled "STATE'S

POSITION EFFECTIVELY BLOCKS THE DEFENDANT FROM BRADY MATERIAL", (App.31a, all caps emphasis in original), even though it is beyond dispute that the victim's pelvis is not in the custody or control of the prosecution.

That the court below misapprehended the issue on this important point is not surprising given that the *Delaney* court, upon which it based its ruling, erroneously and without citation characterized the defendant's interest in that case as involving a "due process" right to "discover" information from private persons. *Delaney, supra*, at 215-16. The *Delaney* court also failed to identify the nature of the interest at stake for victims beyond a reference to "privacy" rights, without any mention of whether such privacy rights are derived from statute, common law and/or state or federal constitutional law. *Delaney* at 216.

A lack of clear guidance from this Court as to whether the accused has any constitutional rights in this context has generated wide-ranging opinions across the nation - from decisions that outright forbid any kind of discovery against third-parties, *People v. Lopez*, 207 Ill.2d 449, 463 (2003) (citing *Chambers* as the source of the defendant's right to request a pelvic examination of the victim, and yet holding that a state court, nonetheless, has "no authority" to order a pelvic examination of a sexual assault victim); *Commonwealth v. Wilson*, 529 Pa. 268 (1992), *cert. denied*, 504 U.S. 977 (1992) (defendant has no constitutional right to obtain privileged third-party information); *People v. Webb*, 6 Cal.4th 494, 518 (1993) (a criminal accused has no constitutional right to demand even "material"

information in the sole custody of a private third-party); *Goldsmith v. State*, 651 A.2d 866, 871 (Md. App. 1995) (defendant's request for a witness' psychiatric record properly denied because the court found "no common law, court rule, statutory or constitutional requirement that a defendant be permitted pretrial discovery of privileged records held by a third party); *State ex rel. Romley v. Superior Court*, 836 P.2d 445, 451-52 (Ariz. Ct. App. 1992) (*Brady* "does not require the victim to cooperate with the defense" by producing her own medical records for his inspection), to rulings such as the one at issue in the case sub judice, which reflects the opposite sentiment and allows defendants relatively easy access even to highly privileged third-party information. *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994); *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006) (defendants can seek pretrial disclosure of entire privileged files from private third-party files, without a showing of specific need, or even a preliminary in camera review by the court); *State v. Barone*, 852 S.W.2d 216, 221 (Tenn. 1993) (courts have "inherent power" to compel the psychological examination of crime victims).

Without review by this Court, the extreme decision at issue here will create even more confusion, and yet evade meaningful judicial review for three main reasons. First, prosecutors typically lack procedural authority to seek interlocutory review of court orders against private third-parties. Second, in the event of an acquittal, double jeopardy effectively precludes post-trial appeals to determine the legality of such orders, and third, even if

interlocutory appeals were possible, prosecutors lack robust standing to represent the personal and constitutional rights of lay witnesses. At the same time, defendants may seek interlocutory review of discovery orders, and raise such issues on direct appeal in the event of a conviction.

These procedural constraints ensure that the legal status of pretrial discovery orders against private third parties, and in particular their constitutional status, will typically not be addressed by reviewing courts when such orders violate the rights of private third parties. Review by this Court is necessary to protect against the systemic invisibility of such violations.

This case is presented in an ideal procedural posture for review by this Court because the parties below have agreed to a stay of the state court proceedings, and a suspension of the defendant's speedy trial rights, until Petitioner has exhausted all opportunities for federal judicial review.

Prior Proceedings

In February 2008, Jason and Jeffrey Wilson were indicted and charged with various crimes related to sexual offenses against their sister, the Petitioner, J.W. The assaults allegedly started in Arizona and continued when the family moved to West Virginia. The indictment charges Jason with four instances of first degree sexual assault between February, 2003, and May, 2005, and one count of incest for the same time period. Petitioner would have been between ages 9 and 11 at the time. The

defendant would have been between ages 18 and 20. (App.39a).

On January 13, 2009, Jason Wilson filed a Motion to Permit Physical Examination "...to determine if there is any physical evidence that this 15 year-old (J.W.) has had repeated traumatic intercourse". (App.54a-57a). Said Motion was filed only on behalf of Jason Wilson. Jeffrey has denied the allegations against him; Jason has admitted to digitally penetrating Petitioner's vagina. (App.40a). The prosecution did not conduct a physical examination of the victim because several years had passed since the last incident of alleged abuse, and the date the incidents were reported to law enforcement, and research has shown that any physical damage that might have been done would have healed years earlier.[2] (App.45a). The prosecutor opposed the defendant's motion, and a hearing was held on January 27, 2009. The prosecutor learned the same day from Petitioner's parents that she has never had a pelvic examination. (App.44a). The defendant's motion was allowed on January 27, 2009. (App.52a-53a). A revised order

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[2] Rather than insisting that the victim be subjected to a pelvic examination, the defendant could have asked the victim on cross-examination whether she had been asked to submit to such an exam by the prosecution during the criminal investigation. When she replied in the negative, the defendant could have later argued to the jury that the prosecution had failed to uncover potentially exculpatory evidence, and that this amounted to reasonable doubt regarding guilt. The prosecutor could have responded by providing an expert to testify about research showing the insignificance of such testing and the jury could have weighed the competing testimonies in determining guilt.

not materially affecting the court's ruling was issued on February 3, 2009. (App.50a-51a).

On behalf of Petitioner, the state filed an ex rel. Application for Writ of Prohibition with the Supreme Court of Appeals for the State of West Virginia on March 6, 2009. (App.36a-49a). The defendant filed his Reply on March 20, 2009. (App.17a-35a). The court issued a show cause order on April 8, 2009 (App.15a-16a), and, after oral argument, issued its final order and judgment on May 14, 2009. (App.1a-14a).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS VIOLATES THE SUPREMACY CLAUSE BECAUSE A STATE COURT HAS NO CONSTITUTIONAL AUTHORITY TO ORDER A MINOR RAPE VICTIM TO SUBMIT TO AN UNWANTED PELVIC EXAMINATION, AND THE MINOR VICTIM HAS A FEDERAL CONSTITUTIONAL RIGHT TO REFUSE TO SUBMIT.

Relying on *State v. Delaney*, 187 W.Va. 212, 417 S.E.2d 903 (1992), the West Virginia Supreme Court of Appeals "balanced" the defendant's "stated need" for a penetrating pelvic examination "against the risk that the examination may cause either physical or psychological harm to the victim..." (App.9a). The court then engaged in a "six-factor" analysis and concluded that the requested test "was

warranted under the facts of this particular case". (App.9a-10a).

The court not only reached the wrong result, it incorrectly framed the issue. The question is not whether the defendant's "need" outweighs the risk of "harm to the victim", but rather, whether the defendant's non-constitutional interest outweighs the victim's federal and fundamental constitutional right to refuse to submit.[3]

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[3] Contrary to the defendant's suggestion below that a forced pelvic examination of the child is fair because victims must submit to such exams "AT THE INSISTENCE OF THE PROSECUTION" (App.24a, all caps emphasis in original), victims are not ordered, forced or compelled to submit to such examinations during the criminal investigation. They are only examined if they give consent to the act, which stands to reason because an individual's fundamental right to refuse such a deeply personal intrusion at the behest of the government applies as much to court orders as requests by police and prosecutors. (see footnote 1). Victims typically agree because if they refuse a necessary examination, the state can decline to prosecute. In other words, just because a rape victim can and often does submit to a pelvic examination during a law enforcement investigation, she is not mandated to do so. Defendant's suggestion to the contrary, alongside comments from the court below such as ""females who undergo gynecological examinations are likely to experience a decreased potential of emotional harm as they increase in age" (App.11a, n.12) and that an unwanted sexual intrusion "would not be 'intrusive under the circumstances'" (App.13a, citing from the trial court's ruling), indicates a serious lack of appreciation for the individualized nature of the harm caused by sexual violence. It is not the physical pain, but the fact that an intrusion into one's personal body parts is "unwanted" that defines the profound harm to the self and the critical need for law to respect the concept of consent as the defining line between pleasure and crime. See generally Stephen J. Schulhofer, Unwanted Sex, The Culture of Intimidation and

The Accused Has No Federal Constitutional "Right" In This Controversy

Tellingly, the West Virginia court nowhere cites a constitutional principle in support of its decision, but writes in a footnote that "[t]he stated purpose of the examination is to determine if there is any

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the Failure of Law (Harvard University Press 1998) (explaining the nature of human autonomy and bodily integrity in the context of sexual violence, and noting the pervasive "unsatisfactory boundaries of existing laws" against unwanted sexual intrusions). The parties below barely considered Petitioner's authority in this regard and instead, engaged in an objective analysis of whether the act would be harmful to the victim. While a more objective analysis applies in circumstances where law enforcement seeks to obtain evidence from inside the body of a suspect in a criminal investigation, *Schmerber v. California*, 384 U.S. 757, 769-770 (1966) (irrespective of suspect's willingness to submit, court-ordered blood test is permissible when there a "clear indication" that probative evidence will be found in suspect's blood), a crime victim has a very different relationship with the criminal justice system. Unlike a crime victim, a perpetrator is a party to a proceeding that has been initiated by the government and is designed to punish and deter his behavior. Clearly, the state has no similar relationship with the victim. Yet, in his brief to the West Virginia Supreme Court of Appeals, the defendant directly correlates the status of the accused to that of the victim by suggesting that a victim should be subjected to an intrusive pelvic exam if a defendant can be compelled to submit to a blood test under *Schmerber*. (App.25a). The court below, likewise, nowhere acknowledges this critical difference between victims and defendants or the reason why this difference demands absolute deference to the victim's choice, irrespective of who requests the examination. See *State v. Lopez*, 207 Ill.2d 449, 466 (2003) (noting that victim has "ultimate" authority to decide whether to be examined.)

evidence that Petitioner's hymen has been disturbed." (App.5a). Clearly, the court recognizes that the defendant seeks "discovery" of information. And while the accused has a well-settled right of access to certain information in the custody or control of the prosecution, his right is more correctly described as an obligation of production on the part of the government, than a "right of 'discovery'". Indeed, this Court has repeatedly held that while the accused is entitled to receive exculpatory evidence, such as so-called "Brady" material, he enjoys no general constitutional "right" of "discovery". *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997). Where no general right of "discovery" exists between the accused and his opponent, the state, he can hardly claim such a right as against private persons. The court below nowhere acknowledges this important point, or appears to appreciate that while a state court judge certainly has authority to order the prosecution and its agents to produce evidence and perform certain functions during the pretrial period at the behest of the accused, the court's power to issue orders against private citizens is more limited because the accused enjoys no constitutional legal relationship with private persons that could possibly be construed as including a right of "discovery", particularly during the pretrial period.

Petitioner Has Multiple Federal Constitutional Rights At Stake, Including Fundamental Liberty Interests

i. Due Process – Privacy

The Due Process Clause specially protects those freedoms that are "deeply rooted in this Nation's history and tradition," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), or that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). These include a fundamental—and cherished—right to be "let alone", *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), ultimately identified as a "penumbral" right to "privacy" inherent in the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) this Court outlined two strands of due process privacy interests: (1) "the individual interest in avoiding disclosure of personal matters" and (2) "the interest in independence in making certain kinds of important decisions." *Id.* at 599-600.

The pelvic examination at issue here implicates both strands of privacy because it commands the extraction of information from a private body part, and deprives Petitioner of the ability to control who has access to her intimate body, thus threatens her interest in controlling the release of confidential information, but also encroaches on her fundamental right to individual autonomy and authority over the self. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). See also *Lawrence v. Texas*, 539 U.S.

558, 123 S.Ct. 2472, 156 L. Ed.2d 508 (2003).

ii. Due Process - Bodily Integrity

Substantive Due Process has also been interpreted as protecting personal and bodily integrity against unjustified intrusions at the hands of the state, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

iii. The Fourth Amendment

A pelvic examination additionally implicates federal constitutional rights under the Fourth Amendment, and because of the deeply intrusive nature of the exam, calls for an especially high degree of judicial scrutiny. *Schmerber v. California*, 384 U.S. 757, 769-770 (1966) ("clear indication" rather than mere "probable cause" needed for government-compelled intrusion into the body); accord *Bell v. Wolfish*, 441 U.S. 520, 558-60, and n.39 (1979); *Winston v. Lee*, 470 U.S. 753 (1985) (surgical removal of bullet); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (breathalyzer and urine sample); *Sandin v. Conner*, 515 U.S. 472, 475 (1995) (strip search and inspection of rectal area); see *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (Fourth Amendment protection applies to individuals, and is not limited to those suspected of criminal behavior).

Where a defendant can cite only a state common law right in support of his request to violate the federal constitutional rights of another, a court may not "balance" the federal rights at stake, but

must "disregard" state law altogether. *Cooper v. Aaron*, 358 U.S. 1 (1958). *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816) (it is "imperative upon the state judges" that they enforce federal law); *Claflin v. Houseman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa v. Katt*, 330 U.S. 386 (1947); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (application of statutory anti discrimination statute invalidated, not "balanced" when pitted against competing federal constitutional interest). Even if the defendant's rights here were somehow vested in the West Virginia state constitution, the supremacy of federal law would require summary denial of his request. *Malloy v. Hogan*, 84 S.Ct. 1489, 1493-1494 (1964) (while state constitutional rights can exceed those provided under federal constitutional law, they cannot be interpreted so as to violate another person's federal constitutional rights); accord *Romer v. Evans*, 517 U.S. 620 (1996) (constitutional amendment purporting to allow landlords or employers the "freedom" to discriminate against homosexuals invalidated).

State Courts Are Forbidden to Intrude on Victims' Liberty Interests in Criminal Proceedings

Even if the Supremacy Clause were not applicable, where Fourth Amendment and Substantive Due Process rights are at stake, the Constitution forbids the government to infringe on such liberty interests, no matter what procedural protections are provided, unless the infringement is

narrowly tailored to serve a "compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); accord *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (the Due Process clause provides "heightened protection against government interference with certain fundamental rights and liberty interests.")

The court below characterized the defendant as having demonstrated a "compelling need", but nowhere suggests the status of the defendant as an accused criminal amounts to a "compelling state interest". Nor could the court so hold without imbuing all criminal defendants with an automatic trump card as against the liberty interests of others, which, as argued above, would offend the principle of Supremacy.

As against Petitioner's fundamental liberty interest and her right to be free from an unwanted intrusion into the sanctity and privacy of her intimate body parts, the defendant's need, because it is not a "compelling state interest", must fail.

Even if the defendant enjoys a "right" to argue that, based on the facts of this case, his request rises to the level of "compelling state interest", his claim fails.

Two different individuals stand charged with rape and other sex crimes against Petitioner, though only one moved for a pelvic examination. With two alleged offenders, if the hymen is examined, and damage is present, the defendant can argue it was caused by the other assailant, and there will be no way to prove or disprove this claim. If no damage is present, he will argue he committed no crime, yet he has already confessed to digitally penetrating the victim's vagina. In these circumstances, there is no

probative value in, much less a "compelling need" for information about, the condition of the victim's hymen.[4]

II. THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION HAS EXPRESSED SERIOUS CONCERN THAT THE DECISION BELOW WILL INHIBIT THE SUCCESSFUL PROSECUTION OF SEXUAL VIOLENCE, CAUSE NEEDLESS HARM TO CRIME VICTIMS, AND ADD TO THE CONFUSING AND CONFLICTING RULINGS AMONG THE STATES.

After learning of the decision below from the West Virginia Supreme Court of Appeals, the National District Attorneys' Association expressed grave concern about the impact of the ruling on the effective prosecution of crime nationwide.

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[4] A similar analysis under *Schmerber's* Fourth Amendment "clear indication" standard, which has only questionable application because the victim is not the target of government suspicion, leads to the same result because there is no "indication" much less a "clear" one, that anything but inconsequential evidence exists inside Petitioner's body. While the state may have authority to obtain a search warrant under *Schmerber* to obtain evidence from inside a victim's body, it is not obligated to do so. A discretionary decision by the state NOT to conduct its investigation in a certain manner does not then vest in the accused a right to use the state's power to investigate more, or differently. This does not leave the defendant without a remedy because prosecutors are duty bound to investigate crime consistent with Due Process and the accused can file motions to dismiss and suppress if the state fails in this regard.

Chris Chiles, a West Virginia prosecutor and President of the National District Attorney's Association, spoke on behalf of the nation's thousands of prosecutors:

> This decision reflects a disturbing and growing national trend, where a court makes a decision without apparent understanding of the rights at stake for innocent victims. Defendants have important rights under our constitution and laws, but sometimes the rights of victims are paramount. This is one of those cases.[5]

President Chiles explained further:

> Forcing a rape victim of any age, but particularly a child, to undergo an invasive pelvic examination against her will *because* she was the victim of a crime violates our sense of moral decency as well as violating the rights of the victim and the community. We can all agree that it would be inhumane for a court to allow a man to force a child to submit to such an examination when he *isn't* charged with raping her. How can it possibly become *more* fair, indeed, an act of justice, to command such an examination only *after* the he is accused of committing a vicious crime against her? There's a difference between ensuring that the accused

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[5] NDAA president Chris Chiles, cited during a telephone conversation with undersigned counsel on August 10, 2009.

> receives a fair trial against his opponent, the prosecution, and rewarding him with governmental power to use against private citizens, especially to the extent it allows him to cause the same kind of harm to his victim's body, again, with the imprimatur of law. If this ruling is allowed to stand, the already difficult job of holding child molesters and rapists accountable will be made even more difficult. Too many obstacles already stand in the way between victims and justice. Prosecutors in jurisdictions where intrusive examinations are allowed will be obligated, at the outset of a prosecution, to advise victims and their parents (if the victim is a minor) that a court may order the victim to submit to a pelvic or other intrusive examination. The NDAA believes this will dissuade even more children and adult crime victims from coming forward.[6]

Confirming the concern set forth above in Petitioner's Introduction/Summary of Argument regarding confusion among the states, President Chiles added:

> Review by the United States Supreme Court is essential not only to correct the decision below, but to ensure that states do not adopt different standards such that victims in some states receive little

[6] *Id.*

> protection from such orders, while in other states, pelvic exams at the behest of the accused are summarily denied. The NDAA is eager to have federal guidance on this important case, so that children and victims across America will have a baseline of protection for their fundamental rights, and a guarantee that no person who reports such a serious crime will be forced to choose between bodily integrity and access to justice.[7]

CONCLUSION

This Court should grant review not only to articulate the nature of the federal constitutional interests at stake for Petitioner, but also to establish a bright-line rule that emphasizes the important difference between the constitutional legal relationship between the accused and the state – and the absence of such a relationship between the accused and private persons, particularly with regard to pre-trial discovery. *People v. Lopez*, 207 Ill.2d 449, 459-60 (2003) (noting that victims are not "under the control of the state, and discussing the important difference between the status of victims as plaintiffs in civil litigation, and their non-party status in criminal cases). Clearer guidance regarding the absence of state court authority to compel pelvic examinations and to issue other intrusive "discovery" orders against private third-parties will not only prevent unconstitutional orders

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[7] *Id.*

such as the one at issue here, but will also protect the system from needless burdens. If left to stand, the ruling below will subject victims and lay witnesses to a wide range of highly intrusive pretrial discovery requests at the behest of the accused.[8] For example, if the defendant can request a pelvic examination to determine the condition of a rape victim's hymen, what would inhibit a judge from allowing a defendant to enter the interior of the victim's house, in a home invasion case, to examine certain "conditions" at the crime scene?

Private citizens facing such orders will be entitled to notice and hearing rights as a matter of procedural due process, which will require the attendance of third-party attorneys, paid for by the government in the event of indigency. Though crime victims typically lack standing to be heard in criminal cases, in part because their personal rights are not ordinarily implicated, such standing is implicit in the federal due process clause whenever, as here, an individual faces the forced deprivation of a constitutionally-protected liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (Due Process requires, at a minimum, notice and an opportunity to be heard

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[8] Such "discovery" requests will undoubtedly cause unconscionable results. Murphy, W., Minimizing the Likelihood of Discovery of Victims' Counseling Records and Other Personal Confidential Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right of Confidentiality, 32 New Eng. L. Rev. 983 n.24 (1998). See *People v. Lopez*, 207 Ill.2d 449, 466 (2003) (discussing the "unacceptable and intolerable defense tactic of using psychological examinations as tools to harass, intimidate, and embarrass' crime victims).

"...at a meaningful time and a meaningful place." *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

Without review by this Court, orders subjecting private third-parties to intrusive pre-trial orders will continue to generate a patchwork of inconsistent rulings as different jurisdictions render decisions without clarity as to the nature of the interest at stake, or the proper procedures to apply, when federal constitutional rights of third-parties are threatened or violated in state criminal proceedings. U.S. Dept. of Justice, Report to Congress: The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors, Findings and Model Legislation, H.R. Rep. No. 103-395 (1993)

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari. The Court may also consider summary reversal.

Respectfully submitted,

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Attorney for Petitioner

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

January 2009 Term

No. 34811

STATE EX REL, J.W.,
Petitioner,

v.

THE HONORABLE DAVID W.
KNIGHT, SENIOR STATUS JUDGE,
CIRCUIT COURT OF MERCER COUNTY,
Respondent.

Petition for a Writ of Prohibition

WRIT DENIED

Submitted: April 29, 2009
Filed: May 14, 2009

Deborah K. Garton, Assistant Prosecuting Attorney
Mercer County Prosecuting Attorney's Office
Princeton, West Virginia
Counsel for the Petitioner

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Princeton, West Virginia
And
David B. Kelley
Bluefield, West Virginia
Counsel for the Respondent

The Opinion of the court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "In determining whether to entertain and issue the write of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary write of prohibition should

issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

2. "In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use." Syl. Pt. 3, State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992).

Per curiam:

On behalf of Petitioner J.W.,[1] the State seeks a writ of prohibition to prevent the Circuit Court of Mercer County from enforcing its orders of January 27 and February 3, 2009, which require J.W., the alleged victim of multiple traumatic sexual assaults, to undergo a pelvic examination. Based on Petitioner's age and the gynecological nature of the examination, the State seeks to prevent the examination from transpiring. Jason Wilson, one of the alleged perpetrators of the sexual assaults at issue[2] and the brother of J.W., argues that he has demonstrated the requisite compelling need for the examination at issue. Upon our review of the record in this case in conjunction with applicable law, we find that the trial court did not exceed its authority in directing that Petitioner undergo a limited physical examination. Accordingly, we find no basis for issuing the requested writ of prohibition.

During its February 2008 term, the grand jury sitting in the Circuit Court of mercer County returned indictments against Jason and Jeffrey Wilson charging them with the commission of various acts of sexual abuse against their sister, the Petitioner. Under the facts as set forth in the

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[1]Consistent with our practice of protecting the identities of juveniles in sensitive matters, we identify the Petitioner in this matter by initials only. See *State ex rel. Dep't of Human Servs. V. Cheryl M.*, 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 192 n.1 (1987).

[2]Another brother of Petitioner, Jeffrey Wilson, has also been indicted for committing multiple acts of sexual assault upon J.W.

indictment, the assaults began in February 2003[3] when the family was living in Arizona and continued to occur after the family relocated to West Virginia until may 2005.

J.W. first reported the alleged abuse to Lawrence Richmond, a counselor who was treating her for ADHD. Initially, she identified Jason as the only perpetrator and denied any abuse on the part of Jeffrey. Later, when she was undergoing therapy for the sexual abuse allegedly committed by Jason, Petitioner identified Jeffrey as an additional perpetrator of sexual offenses against her.[4]

Through a motion filed on January 13, 2009, Jason Wilson sought to require Petitioner to undergo a physical examination by a medical expert selected by the trial court.[5] In support of his motion, Jason Wilson referred to alleged statements made by

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[3]The indictment charges Jason Wilson with four instances of first degree sexual assault between February 2003 and May 2005 and one count of incest during that same period. Jeffrey Wilson is charged with two counts of first degree sexual assaults between March 2004 and September 2005 and one count of incest during that time period.

[4]Jeffrey has denied the allegations against him; Jason has only admitted to committing digital penetration of his sister.

[5]The stated purpose of the examination is to determine if there is any evidence that Petitioner's hymen has been disturbed. Based on the alleged traumatic nature of the assaults, Jason Wilson contends that forensic evidence of the abuse should exist if those assaults took place. The State counters that it is prepared to put on evidence, should it be necessary, to account for the absence of evidence of a disturbed hymen.

Petitioner to various medical providers, psychologists, and investigators in which J.W. purportedly denied that any physical penetration or intercourse had occurred between Jason and herself. Only later when she was in therapy with Phyllis Hasty[6] did J.W. change her story to claim that Jason had repeatedly had sexual intercourse with her. Through the motion, Jason Wilson requested "a discreet, confidential physical examination by a qualified medical doctor to determine if there is any evidence" of "repeated traumatic intercourse." Citing Petitioner's physical maturity and her age of fifteen years, he contends that the examination is unlikely to cause any "greater emotional upset than the State has already submitted her to "through its prosecution of this case.

According to Jason Wilson, the reversal in Petitioner's story "raises the specter that these allegations could be . . . [the] result of suggestive questioning, imagination, or fabrication." In the interest of protecting the confidentiality of J.W., he proposed that the results of the gynecological examination be tendered to the trial court for an *in camera* review. Following that review, the trial court will evaluate whether the results are probative on an issue to be tried and only after such a determination is made, would the results of the examination be provided to the defense. In furtherance of his motion, Jason Wilson argued that

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[6]According to Jason Wilson, Ms. Hasty is a registered play therapist "who has been a member of the State's prosecution team for sexual molestation cases in Mercer County for some time."

this type of examination is routinely performed in cases involving allegations of rape and that hit is conducted in a "respectful, discreet and non-threatening manner.' Finally, he asserts that the evidence which he seeks form the physical examination is not available form any other source.

After hearing arguments on the motion to permit a physical examination, the trial court concluded that in light of the allegations made in this case and the victim's age, he did not find the requirement of a pelvic exam to be "intrusive." Pursuant to an order entered on January 27, 2009, the trial court granted the motion for the examination requested by Jason Wilson,[7] observing that "the victim is fifteen (15) years of age and females of that age customarily have pelvic examinations.' Due to confusion over the selection of the examining physician and identification of which party was responsible for the examination costs, the examination was not performed.[8] After these issues were addressed to the trial court, a second order was entered on February 3, 2009, which directed that Dr. Jamette Huffman perform the subject physical examination and required the State to pay for the

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[7]The order entered on January 27, 2009, wrongly indicated that the trial court was granting the State's motion for the physical examination. In the subsequent order entered on February 3, 2009, this error was to accurately reflect that the Defendant, rather than the State, had sought the examination.

[8]In its order of January 27, 2009, the trial court directed that the examination be performed with "due speed" because of the February 3, 2009, trial date.

exam. Through this petition for a write of prohibition, the State seeks to prevent the occurrence of the pelvic examination of J.W. that the trial court directed through its orders of January 27 and February 3, 2009.

II. Standard of Review

When this court is asked to determine whether a trial court has exceeded its authority, our review is conducted based upon the standards, now axiomatic, that we initially set forth in syllabus point four of State ex rel. *Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers this Court will examine five factors: (1) whether the party seeking the writ has no other means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors

need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Id. at 14-15, 483 S.E.2d at 14-15. Pursuant to these well-established factors, we proceed to consider whether the trial court overstepped its authority by issuing the orders that require J.W. to undergo a limited pelvic examination.

III. Discussion

In syllabus point three of *State v. Delaney*, 187 W.Va. 212, 417 S.E.2d 903 (1992), we announced the standards by which a trial court is required to evaluate a party's request for either a physical or a psychological examination. Recognizing that a party's stated need for such an examination must be balanced against he risk that the examination may cause either physical or psychological harm to the victim, we adopted the following test to aid trial courts when ruling on this type of motion:

> In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the

remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use. Delaney, 187 W.Va. at 213, 417 S.E.2d at 904, syl. Pt. 3.

Challenging the application of the six-factor test we adopted in *Delaney*, the State argues that the gynecological examination ordered by the trial court "is intrusive and would be humiliating to anyone who has not experienced it." *See id.* As the State acknowledged, J.W. did not testify at the pretrial hearing with regard to her specific objections to the requested examination.[9] Additionally, the State posits that inconsistencies in the Petitioner's statements regarding the alleged acts of abuse should not bear on the trial court's consideration of the need for the subject examination.

Rejecting the Petitioner's contention that he failed to demonstrate the requisite "compelling need or reason" for the physical examination at issue, Jason Wilson reviewed the six factors included in the *Delaney* test and how they relate to the facts of this case. *See Delaney*, 187 W.Va. at 213, 417 S.E.2d at 904, syl. Pt. 3, in part. With regard to factor one, the nature of the requested examination and its inherent intrusiveness, he explained that the gynecological examination would be performed by a female physical and would be a brief examination,

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[9]The State apparently asks this court to take judicial notice of the fact that a gynecological examination "is intrusive and would be humiliating" based on Petitioner's age and the fact that she has not previously had such an examination.

intentionally limited in scope.[10] Seeking to dispel the State's argument that the examination is necessarily intrusive, Jason Wilson observes that not only does the State routinely require this type of examination in cases of alleged rape, but women in the general population regularly undergo more extensive gynecological examination[11] for health purposes.

Factor two of *Delaney* requires a consideration of the victim's age. J.W. was fifteen at the time of the request for the physical examination. In this case, factor three, which requires consideration of the lasting physical and/or emotional effects of the examination is arguably also tied to the age of the victim.[12] Referencing clinical evidence regarding the emotional effects of this type of examination based on the subject's age, Jason Wilson argues that the gynecological examination should not cause her "any long term effects." Acknowledging that J.W. might experience embarrassment as the result of being required to undergo the examination, he maintains that there is no reason to expect any long terms

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[10]*See supra* note 5.

[11]In contrast to the type of examination that women customarily undergo as part of a routine annual gynecological examination, the physical examination at issue is not an in-depth cervical examination. *See supra* note 5.

[12]It stands to reason that females who undergo gynecological examinations are likely to experience a decreased potential of emotional harm as they increase in age.

psychological effects stemming form the examination.[13]

With regard to the fourth Delaney factor, which requires consideration of the probative value of the examination, Jason Wilson argues that this evidence is crucial to his defense.[14] Dependent upon the results of the examination, he intends to rely on such evidence to argue that the charges brought against him by the State are baseless.[15] While recognizing that he is taking a risk in requesting medical information that has the potential to inculpate rather than exculpate him, Jason Wilson seeks to gain access to physical evidence that will potentially assist in his defense.

The fifth *Delaney* factor looks to the remoteness in time of the examination with reference to the alleged criminal act. Because the charges at issue span the time period of February 2003 to May 2005, the examination at issue would be taking place four years after the last alleged act of sexual abuse. Due to his fairly large stature combined with the eight-year difference in their

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[13]He makes this representation based upon his purported consultation with a local psychologist, Dr. David Clayman.

[14]Counsel for Jason Wilson stressed that the evidence which he seeks to obtain from the gynecological examination "is clearly the most compelling evidence that we could have to dispute" the charges asserted against his client.

[15]*See supra* note 5.

ages,[16] Jason Wilson contends that evidence of the alleged "forcible, traumatic penetrations" should remain despite this passage of time. The State represents that it is prepared to introduce evidence that after a period of only six months indicia of sexual trauma may no longer exist.[17] As to the final *Delaney* factor, which looks to the availability of evidence from other sources, Jason Wilson asserts that there is not other evidence that he can obtain to refute the charges against him.

Upon its consideration of these arguments addressing the six factors we set forth in *Delaney*, the trial court focused on both the age of the alleged victim and the fact that women of this age "customarily have pelvic examinations." While recognizing that a pelvic examination would be intrusive to a young child, the trial court reasoned that the age of J.W. combined with the fact that the State routinely utilizes evidence that it obtains by comparable means form a rape kit test suggested that the requested examination would not be "intrusive under the circumstances." The trial court further recognized that Jason Wilson was taking a gamble that the evidence he was seeking to prove his innocence may in fact bolster the State's case.

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[16]The record suggests that J.W. would have been between the ages of nine and eleven at the time of the assaults alleged in the indictment, while Jason Wilson would have been between the ages of sixteen and eighteen.

[17]Evidence to this effect was introduced by the State in *Delaney*. See 187 W.Va. at 216, 417 S.E.2d at 907.

Upon our careful review of the record in this case against the arguments of counsel, we find that the trial court considered and applied the six factors we adopted in *Delaney* in ruling that the physical examination requested by Jason Wilson was warranted under the facts of this particular case. Finding no basis for determining that the trial court committed error in ordering that Petitioner undergo a limited physical examination, the grounds for issuing a writ of prohibition have not been met. See Syl. Pt. 4, *Hoover v. Berger*, 199 W.Va. at 14-15, 483 S.E.2d at 14-15. Accordingly, we refuse to issue the requested writ of prohibition. The Clerks is directed to issue the mandate forthwith.

Writ denied.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th of April, 2009, the following order was made and entered:

State of West Virginia ex rel. Deborah K. Garton, Assistant Prosecuting Attorney, Petitioner

vs. No. 34811

Honorable David W. Knight, Senior Status Judge of The Circuit Court of Mercer County, Respondent

On a former day, to-wit, March 6, 2009, came the petitioner, State of West Virginia, by Deborah K. Garton, Assistant Prosecuting Attorney, and presented to the court its petition praying for a writ of prohibition to be directed against the respondent, Honorable David. W. Knight, Senior Status Judge of the Circuit Court of Mercer County, as therein set forth. Thereafter, on March 20, 2009, came the respondent, Jason Wilson, by William Flanigan, Sanders, Austin, Flanigan & Flanigan; and David B. Kelley, his attorneys, pursuant to a request under Rule 14(b) of the Rules of Appellate Procedure, and presented to the Court his initial response thereto.

Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue directed against the respondent returnable before this Court at its courtroom in the City of Charleston,

County of Kanawha, at ten o'clock, a.m., on Wednesday, the 29th day of April, 2009, commanding and directing the said respondents to show cause, if any the can, why a writ of prohibition should not be awarded against the Honorable David W. Knight, Senior Status Judge of the Circuit Court of Mercer County, as prayed for by the petitioner in her said petition.

It is further ordered that consideration of this matter be expedited, and any response to the rule to show cause under Rule 14 (d) of the Rules and Appellate Procedures shall be filed by the respondent on or before April 24, 2009.

Service of a copy of this order upon the respondents aforesaid shall have the same effect as the service of a formal writ.

A True Copy

Attest:_____

Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

STATE EX REL, J.W.,
Petitioner,

Criminal Action No: 08-F-143-DK

THE HONORABLE DAVID W.
KNIGHT, SENIOR STATUS JUDGE,
CIRCUIT COURT OF MERCER COUNTY,
Respondent.

REPLY TO APPLICATION FOR WRIT OF
PROHIBITION

I.
STATEMENT OF FACTS

Jason Wilson stands charged in the Circuit Court of Mercer County with four [4] counts of sexual assault in the first degree and one [1] count of incest. He faces 70-160 years in the West Virginia Penitentiary relating to allegations made by his younger sister. [W.Va. Code §61-8B-3; 61-8-12].

Jason Wilson had been inducted into the United States Army and was days away from completing basic training when he was arrested on

an Indictment that is based solely on the uncorroborated testimony of his younger sister, J.W. J.W. is now 15 years of age [see attached "MySpace" photo]. J.W. has made allegations to the State's forensic expert (play therapist) that Jason had repeatedly, and sometimes forcibly, raped her from age 6 through age 12. The attacks began in Arizona and continued through the family's many moves until they ended up living on Cumberland Road an Union Street in Bluefield, Mercer County, West Virginia.

J.W.'s description of what had occurred between her and her brother changed markedly from that she had revealed to other professionals before the referral to the State's forensic expert.

J.W. was examined by Dr. Fared M. Hussain, M.D., of the Prudich Medical Center in Montcalm, West Virginia on August 16, 2005. This examination was part of the Mercer County Board of Education's efforts to have J.W. re-introduced to the formal education system over the objection of her father. Part of the examination dealt with questions relating to whether she had ever been molested, abused, etc. Her responses to Dr. Hussain were all in the negative.

J.W. did evidence signs of Attention Deficit Disorder and Dr. Hussain referred her to Lawrence Richmond, a licensed psychologist with Laurel Ridge Psychiatric Associates. During that evaluation, her father, who was present, reports that she had told him that she had been sexually molested and abused by her brother. The evaluator recommended

counseling by a female counselor, but J.W.'s father refused that option.

Mr. Richmond continued to see J.W. over several visits in a professional capacity and she denied, during those examination and treatments, that she had ever been sexually penetrated by her brother. She described several touching incidents by the accused, but specifically denied sexual penetration or sexual intercourse. She also reported to the psychologist some abnormal behaviors within the family, including a female friend of the father who had told her that she would be raped and killed and chopped up into pieces at some point in her life [she was 7 at the time of this disclosure]. She also talked about witnessing the same female friend of her father sexually molesting her then 12-year-old brother when she was living in Arizona.

Mr. Richmond was a mandatory reporter and made a referral to the appropriate authorities. J.W. was then interviewed by Sergeant Melissa Clemons on January 13, 2006 of the West Virginia State Police. Sergeant Clemons is an investigator who specializes in investigating and prosecuting sexual offenses against children. She does many forensic interviews and did a forensic interview of J.W. J.W. specifically denied during that interview that she had ever had sexual intercourse or been sexually penetrated by Jason Wilson.

J.W., however, did reveal to Sergeant Clemons certain unusual occurrences that had taken place in her family. She reported, for example, that she slept with her father. She indicated that her father liked to tickle her all over and that she likes it when her

father tickles her. She further reported that she liked laying on the couch, side-by-side, with her father because she "liked laying with him". She revealed her father had beaten her dog with such ferocity it bled from its eyes and nose. Finally, J.W. disclosed all the children were subject to very stern discipline until one came forward and admitted the misconduct—except her.

With respect to Jason, J.W. indicated that he had only touched her one time when they moved into the house that they are in now on Union Street in Bluefield, West Virginia and that they lived in other States. {Both would have been underage during this time period]. None of the siblings reported ever witnessing any untoward behavior directed at J.W. by either her father or by her brother, Jason Wilson.

No charges were brought against Jason based on these pre-trial statements. The Indictment actually was brought two years later after Jason Wilson was inducted into the United State Army and after J.W. participated in "sessions" with a registered play therapist, Phyllis Hasty, who has been a member of the State's prosecution team for sexual molestation cases in Mercer county for some time.

It was well into those sessions, which occurred over many months, that J.W. completely changed her accounts of her interactions with Jason Wilson and now alleged repeated sexual intercourse of a forcible and traumatic nature spanning six years and encompassing activities in several States.

The State did not utilize a forensic physical examination of J.W. after these startling new

disclosures were made – even though J.W.'s new account was directly contradictory of the statements she had made to other professionals.

Jason Wilson, through counsel, moved under State v. Delaney, 417 S.E.2d 903 (W.Va. 1992), for an Order requiring a physical examination by a Court-designated, female physician to determine whether hymen injury was present. Jason Wilson is a fairly large young man and, if true, the forcible, traumatic penetrations that had begun at age six [6] and continued until J.W. was twelve [12] should have produced hymen damage.

The Court considered the age of the accuser---now age 15 (the child in Delaney was 7 or 8); the limited nature of the exam; the fact that such exams routinely are done in sexual assault cases, often at the insistence of the prosecution; and the fact that the literature shows no significant psychological damage risks for young women in J.W.'s age group. The Court was apprised of the compelling need for the evidence by the defense, as it may prove exculpatory in a largely "she said/he said" case. The Court also noted the evidence was unavailable through any other means. [Tr. Hearing, Feb. 3, 2009, pgs. 1-29; Tr. Hearing, Jan 27, 2009, pgs. 1-22].

After weighing the Delaney factors, the Trial Court granted the defense's request, but established very strict guidelines to minimize the intrusion to J.W.:

The examination would be limited to assessing hymen injury. It would be done by a female gynecologist approved by the prosecution and

scheduled by the prosecution. The results would be submitted to the Trial Court for in camera review. The results would only be disclosed if the Trial Court believed the results probative to a claim by the defense or an element of proof for the prosecution.

The examination has been scheduled---which the State seeks to block by its application for a Writ of Prohibition.

II.
THE STATE OF WEST VIRGINIA HAS NOT MET THE REQUIREMENTS FOR THE ISSUANCE OF A WRIT OF PROHIBITION

The State of West Virginia effectively is exercising an interlocutory appeal from a decision of a lower tribunal relating to a matter committed to the Trial Court's discretion, There is no question that the decision of the Trial Court is within its jurisdiction to make and that it is exercising its legitimate powers in deciding whether to order a physical examination of the accuser. State v. Delaney, supra.

This Court, in deciding whether to issue a Writ of Prohibition in circumstances in which the Lower court is properly exercising its jurisdiction, has stated it will be guided by a five [5] factor test. The most important factor bearing on the issue is whether the Petitioner has shown the challenged Order was a "clear error as a matter of law". Syl. Pt. 1, State ex rel, Cline v. Frye, 672 S.E.2d 303 (W.Va. 2008); Syl. Pt. 4, State ex rel, Hoover v. Berger, 199 W.Va. 12, 483 S.E.2fd 12 (1996).

A Writ of Prohibition will not issue "to prevent a simple abuse of discretion by a Trial Court. It will only issue where the Trial Court has no jurisdiction or having such jurisdiction exceeds its legitimate powers". W.Va. Code § 53-1-1; Syl. Pt. 2, State ex rel, Preacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977); Syl. Pt. 1, State ex rel, Nelson v. Frye, 221 W.Va. 391, 655 S.E.2d 137 (W.Va. 2007).

The State has a very high burden in circumstances in which it makes the claim that a Trial Court, though acting within its jurisdiction, nevertheless abused its legitimate powers. The Supreme court has held that the State must demonstrate that the Trial Court's action was so flagrant 'that it [Prosecution] was deprived of its right to prosecute the case or deprived of a valid conviction." Syl. Pt. 1, State v. Angell, 216 W.Va. 626, 609 S.E. 2d 887 (W.Va. 2004).

The Court has made it plain that it will no substitute its judgment for the judgment of the Trial Court when the Trial court is exercising powers legitimately granted to it. The inquiry in such circumstances involving an application for a Writ of Prohibition essentially comes down to whether the Trial Court committed a legal error "plainly in contravention of a clear statutory constitutional or common law mandate which may be resolved independently of any disputed facts..." Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

The Trial Court, here, weighed the defendant's motion for a physical examination under the standards appropriately set by this Court in

Delaney. Syl. Pt. 3, State v. Delaney, 417 S.E.2d 903 (W.Va. 1992). Delaney was designed to protect the defendant's need for evidence while, at the same time, minimizing the intrusiveness or deleterious effect on the accuser who would have to undergo multiple physical examinations when she was of a tender age.

This accuser was not of a tender age. She was 15 at the time of the request. She had not been physically examined at any time, even though such an examination is typically done in these types of cases by the prosecution,. This absence of a report, for the defense to review with its own expert, together with the exculpatory potential of the evidence, supplied the element of a compelling need to have a limited confidential examination done by a qualified female gynecologist under circumstances in which the results would not be published to either the defendant or the State until they had been reviewed, in camera, by the Court.

Physical examinations of an alleged sexual assault victim or sexual abuse victim are routinely done in most States AT THE INSISTENCE OF THE PROSECUTION. The results of such examinations are routinely admitted into evidence to buttress the State's case that penetration has occurred. See, e.g., Hogan v. West, 448 F.Supp. 2d 496 (W.D. NY 2006); People v. Prentiss, 172 P.3rd 919 (CO App. Ct. 2006); State v Green, 951 So. 2d 1226 (LA App. 5th Cir. 2007); State v Young Bok Song, S.W. 3rd 2005, WL 2978972 (TN Crim. App. Ct. 2005); People v. Espinosa, 204 W.L. 1560376 (Cal. Dis. Ct. 2004). There is nothing sinister or unique about this type of

examination and it oftentimes is sought by the prosecution.

Defendants, moreover, have to routinely submit to potentially embarrassing or humiliating or inculpatory examinations, even though they have the supposed pro9tection against self-incrimination. Schmerber v. California, 384 U.S. 757, 86 Sup. Ct. 1826 (1966).

An accused can be forced to submit to a blood test. An accused can be forced to give a voice exemplar; a fingerprint exemplar. He can be forced to be photographed. He can have DNA samples taken. HIV screens run. If he has peculiar, physical attributes that may bolster the credibility of an accused, he can be forced to display, either in photograph or in person, those characteristics for the benefit of the truth-finding mission of the jury. See Schmerber v California, 384 U.S. 757; see, also, Holt v. United States, 218 U.S. 245 (1910); Gilbert v. California, 388 U.S. 263, 37 Sup. Ct. 1951 (1967); United States v. Wade, 388 U.S. 218, 87 Sup. Ct. 1926 (1967).

The principles of due process and the truth-finding mission of our jury system require the defendant to submit to examinations in many cases that are intrusive, embarrassing, humiliating and potentially incriminating.

The same is true of the accuser. There are circumstances in which there is a compelling need, on the part of a defendant, for a physical examination of the accuser when the evidence is not available through another source and the evidence sought may be exculpatory. Delaney, supra.

Ordinarily, this type of matter would be handled by the defense employing its own medical doctor to review the results of a medical examination ordered by the State as part of its prosecution of the case. The defendant's rights are protected in such a circumstance because he has an independent qualified person looking at the results of the original physical examination and the accuser is protected because she does not have to undergo repeated examinations. Delaney, supra. Here, there is no underlying or primary examination to review.

This request is far from unprecedented in this same Circuit. Judge Swope had ordered just such an examination in a case involving a much younger alleged victim several months earlier and the examination took place with no appeal or Writ of Prohibition filed with this court by this very same prosecutor. [State of WV v. Virgil Eugene Shrader, Criminal Action No: 08-F-117-DS].

This accuser is 15 years of age. She is physically mature and has been regularly and routinely seen by various psychologists, police investigators and play therapists associated with the allegations contained in the State's Indictment. None of those evaluations or examinations show that discussing the details of her allegations has in any way caused her psychological trauma or long term psychological effects. It certainly would pose no greater emotional upset than the State has already submitted her to have undergo a discreet, confidential physical examination by a qualified female medical doctor to determine if there is any

physical evidence that this 15 year-old has had repeated traumatic intercourse from age 6 onward.

The Circuit Court furthermore took appropriate steps to protect and minimize any disclosure of the results. The Court ordered that the examination be arranged by the State of West Virginia and that it had the power to select the examiner. It ordered that the examination be undertaken by a female gynecologist and the female gynecologist has consented to undertake the examination. The Court further ordered that the result be submitted to the Court, in camera, and that the court would determine after its review whether there is any evidence that was probative either for the prosecution or for the defense.

There is great peril for the defense in insisting on an examination of the type the prosecution ordinarily would do to bolster its case. It may be better trial strategy to lambaste the State at trial for failing to secure such a vital piece of physical evidence and cross-examine the accuser regarding her many denials of sexual penetration or intercourse. A trial has, as its primary function, truth-finding. It should not be reduced to a "roulette wheel" gamble on who the jury believes when a vital, conclusive piece of evidence, readily available through a confidential medical exam, will assist the jury in determining that truth.

III.
THE CIRCUIT COURT'S DECISION WAS PROPERLY GUIDED BY DELANEY

In State v. Delaney, 187 W. Va. 212, 417 S.E. 2d 903 (1992), the Supreme Court was confronted with the issue of multiple physical and psychological evaluations for 7 and 8-year-old victims. It established six [6] factors to guide a Trial Court's decision about examinations with a special emphasis on protecting children of tender years from multiple intrusive examinations. Id. The Delaney considerations have been fully satisfied by the Trial Court here.

The Delaney Court counseled the Trial Judge considering an examination request to make the determination based on the following factors:

(2) the nature of the examination requested and the intrusiveness inherent in that examination;

(4) the accuser's age;

(6) the resulting physical or emotional effects of the examination on the victim;

(8) the probative value of the examination to the issue before the Court;

(10) the remoteness in time of the examination to the alleged criminal act;

(12) the evidence already available for the defendant's use. Id.

The Trial Court, in the case in review here, plainly was cognizant of these factors in its decision.

The defense requested, and the Court granted, a very limited physical examination of the hymen of a 15 year-old young woman. The examination is to be completed by a female gynecologist to be selected by the prosecution [this examination has already been scheduled]. The results of the examination are to be presented to the Trial Court, in camera, and is to make the determination as to whether the examination reveals evidence that is exculpatory to the defendant, as required under Brady v. Maryland, 373 U.S. 82 (1963), or corroborative of the accuser's changed version of her interactions of her brother when they were much younger. No one can doubt that a trained and board certified female gynecologist is capable of performing this type of examination in a non-intrusive manner. It is the type of examination that not only sexually molested females undergo, but women in the general population undergo.

With respect to the accuser's age, J.W. is 15 years of age. Delaney dealt with repeated evaluations or multiple physical of psychological evaluations of 7 or 8 year-olds. Research done by Dr. David Clayman, as reported to the Trial Court, shows that there is nothing in the research to indicate that someone in this accuser's age group is psychologically harmed by such an evaluation, as opposed to children of tender years. The Trial Court properly considered the resulting physical or emotional effects of the examination of the accuser

and properly concluded that those were minimal in this age category of victim.

The probative value of the examination to the issue before the Court simply cannot be doubted. The accuser had made three [3] statements that basically described her interactions with her brother over a course of several months, This included statements to a Board certified physician; a licensed psychologist; and a trained investigator in sex crimes against children. In all of those sessions, J.W. denied that there had ever been sexual penetration or sexual intercourse between her brother and herself. Once she was referred to the State's "expert", who routinely testifies for the prosecution in sex crimes cases, the accuser's account changed to the point that she now alleges that she was repeatedly, forcibly penetrated from age 6 through age 12. The examination at issue is necessary to determine whether there is physical evidence in the form of injury or damage to the hymen that either contradicts or corroborates this changed account of her interactions with her brother.

The element of "remoteness in time" is satisfied by the fact that the injury a child would sustain through repeated traumatic sexual intercourse with a large male will show scarring, damage to the hymen, or the absence of a hymen for years and years. If the defense were seeking a gynecological examination for the purposes of collecting semen samples, certainly the examination would be remote in time in connection with the issue being addressed. However, in a circumstance where

the new allegation is that this 15 year-old young woman, when she was between the ages of 6 and 12, suffered repeated, forcible sexual intercourse with a much larger male, the physical injuries associated with that interaction would be palpable for years and years to come.

The final Delaney factor is also satisfied – that is, the evidence is not available from any other source. The heart of the Delaney restrictions is to protect the child of tender years from repeated psychological or physical examinations. There has been no physical examinations of this young woman of any kind. If there was available to the defense such an examination, the defense would be able to employ an expert simply for the purposes of reviewing those results rather than subjecting the young woman to another physical exam. That is not an option here. The evidence is available in one form and one form only and that is through a physical examination.

IV.
STATE'S POSITION EFFECTIVELY BLOCKS THE DEFENDANT FROM BRADY MATERIAL

The unfairness of the State's position is self-evident. The State is possessed of and controls a key piece of evidence—physical evidence of whether the accuser has been repeatedly and traumatically raped from age 6 through age 12. The evidence is retrievable by a qualified medical doctor, with minimal intrusion to the patient, and without any

psychological effects as documented by a literature search by Dr. David Clayman.

The State has subjected the accuser to the testing it desires—namely, referral to a forensic "expert" who, though not a licensed psychologist, is permitted to "work with the victim" until an account helpful to the State's prosecution is elicited. Never mind that the results achieved by the "expert" completely contradicts accounts given by the accuser to a trained medical doctor; to a licensed psychologist over several visits; and to an experienced State Police investigator specializing in sexual crimes against children.

The State chooses not to do further testing, namely, a physical examination of the type that is routinely done in cases of this nature, even though the test and examination carries a high probability of either "solidifying the accuser's changed statements" or exonerating the accused of the accusation of repeatedly raping this young woman when she was a child. The evidence sought is potentially exculpatory, Brady v. Maryland, 373 U.S. 82, and there is no more compelling need in the defense of a case than to have access to exculpatory evidence.

At the Hearing in which this issue was being addressed by the Trial Court, the State's only objection was that the examination itself was potentially intrusive and humiliating to the accuser. It offered no psychological evidence to support this position. It did not produce the young woman in Court for the purposes of having her testify to the Judge regarding her own feelings about such an

examination. This issue, moreover, was addressed by research done by David Clayman, a Ph.D./Psychologist who routinely and regularly performs psychological evaluations at the request of the State of West Virginia. Dr. Clayman's research indicated that there is absolutely no evidence that "alleged victims" in this young woman's age category suffer permanent psychological damage as a result of a physical examination to determine injury to the hymen. He did indicate, in representations to counsel that were placed on the record, that in children of extremely tender years, there is evidence of some psychological harm associated with this type of examination.

The Trial Court had to balance the minimal effect on the accuser with the deleterious and devastating effect on the defendant if this examination was denied.

There can be no doubt that a physical examination, in certain circumstances, is intrusive. But it is an intrusion that the Courts routinely allow when necessary for the truth-finding mission of the Trial process. We see physical examinations routinely ordered in civil cases where a person is making a claim for monetary damages. See, W.Va. R.Civ.P.35; See, also, State ex rel, George B. W. v. Kaufman, 483 S.E.2d 852 (W.Va. 1997); State ex rel, By Letts v. Zakaib, 189 W.Va. 616, 433 S.E.2d 554 (W.Va. 1993). In civil cases, the "good cause requirement" is met, in many instances, in which the contest in about whether the defendant will have to pay monetary damages. Certainly, when a person's freedom is at risk as opposed to a person's

"pocketbook", the Trial Court has discretion to order an examination that is performed in a respectful environment by a qualified expert, under circumstances in which the literature indicates will have de minimus, if any, psychological effects.

V.
SUMMARY

The Trial Court ordered this physical examination after considering the factors articulated by Delaney. It was exercising its legitimate, decision-making authority in a case over which it held unquestionable jurisdiction. It neither committed "a clear error of law" nor made a decision that effectively denied the State the ability to make its case. Syl. Pt. 1, State v. Angel, 216 W.Va. 626, 609 S.E. 2d 287. Extraordinary relief by way of a WRIT OR PROHIBITION is simply unavailable to the prosecution in these circumstances.

Respectfully submitted this the 19th day of March, 2009.

JASON WILSON

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IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

Indictment No: 08-F-143-DK

JASON WISON and
JEFFREY WILSON

ORDER

This matter came on this day for a status conference; there appearing are the State of West Virginia, by Deborah Garton, her Assistant Prosecuting Attorney; the defendant, in person, and counsel for defendant, William Flanigan and David Kelley.

For good cause shown and the defendant having waived his right to a trial during this term of Court, it is the ORDER and DECREE of this Court that this matter be continued to the February 2009 Term of court and rescheduled for trial on May 5, 2009 at 9:00 a.m.; that a pre-trial hearing be held on April 27, 2009 at 3:30 p.m.; that any motions be filed ten (10) days prior to the pre-trial hearing; that any response to such motions be filed five (5) days prior to said hearing; and any special instructions shall be provided to the Court at the pre-trial hearing.

Upon motion of the State, it is the ORDER and DECREE of this Court that a transcript of the hearing held on January 27, 2009, as well as today's

hearing, shall be prepared and provided to the parties by this Court's court reporter.

It is the further ORDER and DECREE of this Court that the Order dated January 27, 2009, be amended to properly reflect that the Court granted the "Defendant's" motion, rather than the State's motion.

It is the ORDER and DECREE of this Court that the previously ordered physical examination of the victim be completed by April 6, 2009. Whereupon, defense counsel recommends Dr. Jamette Huffman to perform such examination and the Court will Order Dr. Huffman to perform the examination absent any objection by the State within the next several days. The Court further directs that the State will be responsible for ensuring the fees for the victim's examination are paid. In the event Dr. Huffman declines to perform the victim's examination, the Court shall be notified and an additional hearing will be held for the purpose of agreeing upon another physician.

The Clerk of this Court shall forward a copy of this Order to counsel for defendant and the court reporter.

Dated this 3rd day of February 2009.

ENTER:

_____

DAVID W. KNIGHT,
SENIOR STATUS JUDGE

NO. _____

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

STATE ex rel, J.W.,
Petitioner

v.

Circuit Court of Mercer County
Case # 08-F-143-DK

THE Honorable David W.
Knight, Senior Status Judge,
Respondent.

PETITION FOR WRIT OF PROHIBITION

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Exhibit 3 - Order re: January 27, 2009, Hearing 2
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Exhibit 5 - Order re: February 3, 2009, Hearing 3
Exhibit 6 - Pediatrics, "Genital Anatomy in Pregnant Adolescents: 'Normal' Does not Mean 'Nothing Happened'," Vol. 113, No. 1, January, 2004 5

2. ISSUE PRESENTED

Petitioner respectfully petitions this Honorable Court to issue a rule to show cause why a writ of prohibition should not be awarded pursuant to W.Va. Code § 53-1-1 et. seq. and Rule 14 of the West Virginia Rules of Appellate Procedure, to prohibit the Mercer County Circuit Court from requiring a child sexual assault victim to undergo a pelvic examination to determine whether her hymen is disturbed. This Court has original jurisdiction to hear this Petition pursuant to the above referenced code section and rule.

II. STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

Jason and Jeffrey Wilson were indicted by the February, 2008, term of the Mercer County Circuit Court for molesting their sister, J.W. The State's evidence would be that Jason was the first to abuse J.W., and later Jeffrey began; the assaults started in Arizona and continued when the family moved to West Virginia. The indictment charges Jason with four instances of first degree sexual assault between February, 2003, and May, 2005, and one count of incest for that time period. At the present time, J.W. is age 15, Jason is age 24 and Jeffrey is age 23.

The abuse was first reported to the authorities when J.W. disclosed to her counselor, Lawrence Richmond, who was seeing her for ADHD. At this time, she only identified Jason and denied any abuse on the part of Jeffrey. Later, when she was in

therapy for Jason's sexual abuse, she also identified Jeffrey. Jeffrey has denied the allegations; Jason has admitted digital penetration only.

On January 13, 2009, Jason Wilson filed a Motion to Permit Physical Examination "to determine if there is any physical evidence that this 15 year-old (J.W.) has had repeated traumatic intercourse" (Exhibit 1, Paragraph 4, Page 2). A hearing on said Motion was held before The Honorable David W. Knight, Senior Status Judge, on January 27, 2009 (Exhibit 2). Relying on State v Delaney, 417 F.2d 903 (W.Va. 1992), the defense argued that repeated sexual intercourse with her brother for years would "probably" leave some physical evidence, and, coupled with her conflicting statements as to Jason Wilson's involvement, the defense should be entitled to an order requiring J.W. to submit to a gynecological evaluation (Exhibit 2, p.4). Petitioner contended that such an examination would be intrusive and offensive, the last act of sexual misconduct occurred in September, 2005 (over three years previously), and, in the event the hymen was disturbed, there was no means of determining the perpetrator (Id., pp. 6 and 7). Petitioner further argued that Jason Wilson had failed to show how the results of the examination could be probative, and, when weighed against the intrusiveness of the examination, his motion should be denied (Id.).

The Court reasoned that a pelvic examination would not be that intrusive for a 15 year-old girl, and it was the same kind of examination that the State would have obtained in the case of a recent, quickly reported sexual assault. As the abuse began when

J.W. was a young child, Respondent believed she had "matured a lot since then" (Id., pp. 16 and 17).

Noting that the trial was scheduled for early the following week, Jason Wilson's attorneys requested a continuance. (Id. p.19). The court did not grant that motion in hopes that an examination of J.W. could be accomplished quickly and the trial proceed as scheduled (Id., pp. 19 and 20). This same date Petitioner filed an order reflecting his ruling (Exhibit 3).

Respondent was notified early the following week that the examination had not taken place so, instead of a trial, on February 3, 2009, the parties had another pretrial hearing (Exhibit 4). Petitioner announced its intent to seek a write of prohibition to prevent the court's requiring J.W. to undergo a pelvic examination, and Respondent then scheduled the next trial date so as to allow sufficient time for the State to file its Petition. Since the examination had not been accomplished per the prior court order, Respondent issued another order with greater specificity (Exhibit 5).[1]

III. ASSIGNMENT OF ERROR

That the Respondent cannot enter an order directing a victim to undergo a physical examination absent a compelling need or reason.

---

[1]Pursuant to that order, J.W. is scheduled to see Dr. Janette Huffman, on March 30, 2009.

IV. ARGUMENT
A. STANDARD FOR ISSUING WRIT

Pursuant to West Virginia Code § 53-1-1 et. seq., "(t)he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter and controversy, or, having such jurisdiction exceeds its legitimate powers." This petition is not premature and is the only remedy available to Petitioner because, in its current posture, this criminal case cannot proceed to trial until such time as the child victim is forced to undergo a pelvic examination.

As required in State, ex. rel. Hoover v. Berger, 483 S.E.2d 12 (W.Va. 1996), and approved in State, ex rel. Youngblood v. Sanders, 575 S.E.2d 864 (W.Va. 2002), this Court has a five point standard for issuing writs of prohibition stemming from allegations that the lower court exceeded its authority. Firstly, this Court will determine whether the party seeking the writ has no other adequate means to obtain the desired relief. Proceeding to trial will be contingent upon J.W. undergoing this examination.

Secondly, this Court must determine whether Petitioner will be damaged or prejudiced in a way that is not correctable on appeal. Petitioner contends that nothing can cure the humiliation of requiring a 15 year-old to undergo a gynecological examination if she wants to proceed to trial to face her accusers. Indeed, there is no guaranty that the child would agree to submit to the examination and,

if she refused, it is assumed that the State could not proceed against the defendants.

Thirdly, it is necessary to examine whether the lower court's order is clearly erroneous as a matter of law. Surely, it must be conceded that Respondent did not apply a compelling need or reason test to the defense motion.

Fourthly, this Court must determine whether the lower court's order is an oft repeated error or manifests persistent disregard for procedural or substantive law. Petitioner submits this point of review is inapplicable.

Fifthly, this Court must examine must examine whether the lower tribunal's order raises new and important problems or issues of law of first impression. Petitioner believes that Jason Wilson has misinterpreted State v. Delaney, and the court's granting of his motion to permit a physical examination will have a chilling effect on the prosecution of child sexual assault cases. If the lower court's order is found appropriate, the only thing that would bar an automatic physical examination in a sexual assault case would be a child's tender age.

B. RESPONDENT FAILED TO APPLY A COMPELLING NEED OR REASON TEST

Citing State v. Ramos, 553 A.2d 1059, 1062 (R.I. 1989), this Court adopted a "compelling need or reason tests" set forth by the Supreme Court of Rhode Island as follows:

The practice of granting physical examinations of criminal Witnesses must be approached with utmost judicial restraint And respect for an individual's dignity. In determining Whether to order an independent medical examination, the trial justice should consider (1) the complainant's age, (2) the remoteness in time of the alleged criminal incident to the proposed examination, (3) the degree of intrusiveness and humiliation associated with the procedures, (4) the potentially debilitating physical effects of such an examination, and (5) any other relevant considerations.

In the instant case, Respondent focused on J.W.'s age and found that she was 15 and had "matured a lot since this case started" (Exhibit 2, p. 17). The Respondent has never met J.W., he has never reviewed her therapy records, and he has no way of knowing if she has matured in the time since her brothers left home and the molestation stopped. All the lower court knew was that J.W. is now 15. He apparently agreed with defense counsel that "every female is going to undergo (pelvic examinations) repeated times during her lifetime" (Id., p.5) because Respondent found that the defense was not "asking for anything out of the ordinary" (Id., p.16).[2]

When examining the second factor in the compelling need or reason test, the lower court was

[2] Although it should not be germane to this argument, the victim's advocate in Petitioner's office spoke to J.W.'s parents following the January 27, 2009, hearing and learned that she has never undergone a pelvic examination (Exhibit 4, p. 22).

not concerned that J.W. had last been assaulted over three years before the proposed examination despite the fact that this factor was the most persuasive in State v. Delaney. In that case, the State's expert had testified that physical symptoms of sexual assault can dissipate in as little as six months, and several years had passed since the victims in Delaney had been sexually assaulted. Thus, as reasoned by this Court, any evidence of the assault would have long ago disappeared. Of course, Jason Wilson took the position that J.W.'s hymen is evidence and he is entitled to determine if it has been disturbed (Exhibit 2, p.4). If this was a compelling legal argument, would it not have been addressed in Delaney? The young victims in that case had alleged sexual intercourse, so the presence or absence of a hymen should have the same significance as in J.W.'s case.[3]

The third factor to examine per Delaney is the degree of intrusiveness and humiliation associated wit a pelvic examination. While J.W. did not testify at the pretrial hearing, it really was unnecessary. Obviously the examination is intrusive and would be humiliating to anyone who has not experienced it. Apparently, both defense counsel (Exhibit 2, p.5) and the court (Id., p.16) felt that women are going to undergo the examination routinely throughout their lives, so it was not unreasonable to subject J.W. to

[3] In point of fact, a study published in PEDIATRICS, Vol. 113, No.1, January, 2004, pp. e67-e69 (Exhibit 6) illustrated the fact that definitive findings of penetration are rare (only two of thirty-six pregnant subjects were found to have penetration trauma).

such a procedure in connection with her sexual assault case.

When examining the fourth factor in Delaney, Petitioner would concede that the examination would not result in any debilitating physical effects although it certainly might cause significant emotional effects. As defense counsel noted, there should be no "long term effects other than the embarrassment of having to undergo it" (Exhibit 2, p.5).

The Delaney factors are not al inclusive as evidence by the Court's recognition that there may be other relevant considerations. Jason Wilson justifies the need for a gynecological evaluation of his sister based upon the fact that she did not immediately identify him as one of her sexual offenders. There are many reasons why children disclose abuse in bits and pieces, why they sometimes leave out pertinent information, why they may even recant, etc. These are all issues for trial. Indeed, it would be an exceedingly rare case in which there were not inconsistencies in a victim's testimony. It is wholly illogical to pretend that a pelvic examination is needed because there are inconsistencies in a victim's statements.

V. CONCLUSION

It is respectfully submitted that a writ of prohibition is not premature in this case and is the only remedy available to Petitioner, If the facts of this case meet a compelling need or reason test, it would be difficult to envision a case that would not

meet the test; pelvic examinations of children would become routine. With little or no rationale, Jason Wilson was able to convince the lower court that a gynecological evaluation is not out of the ordinary for a 15 year-old child, and it is perfectly reasonable to subject a sexual assault victim to such an examination to determine if her hymen is disturbed. This argument does not remotely come within the prevue of Delaney.

WHEREFORE, Petitioner prays that this Court issue a rule to show cause, stay the gynecological evaluation of J.W. pending this Court's ruling and grant a Writ of Prohibition to prohibit the Respondent from requiring such an evaluation in advance of the State proceeding to trial.

Respectfully submitted,

DEBORAH K. GARTON

VERIFICATION

I, DEBORAH K. GARTON, counsel for the Petitioner Jason Wilson, after being duly sworn according to law, depose and say that the facts and allegations contained in the foregoing Petition for Writ of Prohibition are true, so far as they are therein stated to be upon information and belief, I believe them to be true.

_____

Deborah K. Garton

Taken, sworn to and subscribed to before me this 4th day of March, 2009, by Deborah K. Garton.

_____

Notary Public

My commission expires:

MEMORANDUM OF PERSONS TO BE SERVED

The persons to be served the rule to show cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows, to wit:

The Honorable David W. Knight,
Senior Status Judge
332 Old Bluefield Road
Princeton, WV 24740

Jamette Huffman, D.O.
403 12th Street Extension
Princeton, WV 24740

CERTIFICATE OF SERVICE

I DEBORAH K. GARTON, attorney for the Petitioner, State ex. rel., Jason Wilson, hereby certify that I served a true copy of the Petitioner's

Petition for Writ of Prohibition on the 4th day of March, 2009, by first-class mailing to last-known addresses, postage-prepaid to the following:

The Honorable David W. Knight,
Senior Status Judge
332 Old Bluefield Road
Princeton, WV 24740

William Flanigan, Esq.
Sanders, Austin, Flanigan & Flanigan
Attorneys at Law
320 Courthouse Road
Princeton, WV 24740

_____

Deborah K. Garton

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VI. Indictment No: 08-F-143-DK

JASON WISON and
JEFFREY WILSON

ORDER

This matter came on this day upon defendant's Motion to Permit Physical Examination; there appearing are the State of West Virginia by Scott A. Ash, her Assistant Prosecuting Attorney; the defendant, in person and by counsel, William Flanigan and David Kelley.

After due consideration of the pleading filed herein and argument of counsel, the Court notes the victim is fifteen (15) years of age and females of that age customarily have pelvic examination. Therefore, the Court GRANTS the defendant's motion and it is the ORDER and DECREE of this Court that the victim undergo a physical examination by a local physical. The Court notes that such examination should be completed with all due speed given that the trial is scheduled to begin on February 3, 2009.

Thereupon, counsel for defendant moved to continue the trial in the matter, to which motion the

State objects. The Court takes the defendant's motion under advisement at the time to determine whether or not the examination can be completed.

The Clerk shall forward a copy of this Order to counsel for defendant.

Dated this 27th day of January 2009.

ENTER:

_____

DAVID W. KNIGHT, SENIOR STATUS JUDGE

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VI. Indictment No: 08-F-143-DK

JASON WISON and
JEFFREY WILSON

MOTION TO PERMIT PHYSICAL EXAMINATION

Jason Wilson, by counsel, moves this Court for an Order requiring the accused, J.W., to undergo a physical examination by a medical expert selected by the court. In support hereof, your movant states as follows:

1. The accuser has made various statements to medical providers, psychologists and even investigators that there was never any physical penetration or intercourse between she and the defendant. These denials came in an examination by Dr. Farid M. Hussainn M.D., c/o Prudich Medical Center, Montcalm, West Virginia on August 16, 2005. In an evaluation by a psychologist on October 14, 2005 [Lawrence Richmond, M.A.], J.W. denied any penetration and described a "humping" episode and efforts at having her undress.

2. In a forensic interview undertaken by Sergeant Clemons of the West Virginia State Police on January 13, 2006, J.W. again denied any penetration and described only one incident that occurred in West Virginia that, fairly described, involved touching underneath the clothes, digitally, but no penetration.

3. Months later, J.W. changed her story after numerous sessions with Phyllis Hasty. She now alleges that Jason Wilson repeatedly had sexual intercourse with her.

4. The accuser is 15 years of age. She is physically mature and has been regularly and routinely seen by various psychologists, police investigators and play therapists associated wit the allegations contained in the State's Indictment. It would pose no greater emotional upset than the State has already submitted her to have her undergo a discreet, confidential physical examination by a qualified medical doctor to determine if there is any physical evidence that this 15 year-old has had repeated traumatic intercourse.

5. The probative value of the examination is obvious. The accuser now alleges intercourse spanning a period from the time she was 6 years old through age 12 or 13. This allegation is in stark contrast to the numerous statements she has given previously denying penetration had ever occurred. This raises the specter that these allegations could be as a result of suggestive questioning, imagination,

or fabrication. The test of that is a physical examination done by a qualified medical expert who can report to the Court, in camera, the results of his/her examination. Then the Court can decide, upon reviewing the material, whether it is probative to an issue to be tried in the case and, if so, decide whether it is to be turned over to the defense . This protects the confidentiality of J.W.

6. These types of examination are routinely done in cases involving allegations of rape. There are "rape" teams" or "sexual battery teams" that have been fully trained and certified to undertake these examinations in a respectful, discreet and non-threatening manner. The Court is empowered to select the examiner, the date and time of the examination, and the nature of the examination, as well as to require that the examiner's findings be reported to the Court first rather than to the defense.

7. This evidence is available from no other source. The "late allegation of penetration" and the complete reversal of the accuser's story justifies and provides the legal basis for the defense to have this examination done. It could potentially be exculpatory and exonerating and, therefore, meets the criteria under Syl. Pt. 3 of State v. Delaney, 417 S.E. 2d 903 (W.Va 1992) to authorize such an examination.

Respectfully submitted this the ____day of January, 2009

JASON WILSON
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(2)

No. 09-191

Supreme Court, U.S.
FILED
SEP 4 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

J.W.,

Petitioner,

v.

THE HONORABLE DAVID W. KNIGHT, IN HIS OFFICIAL CAPACITY AS SENIOR STATUS JUDGE, CIRCUIT COURT OF MERCER COUNTY FOR THE STATE OF WEST VIRGINIA,

Respondent,

JASON WILSON,

Real Party In Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION OF JASON WILSON, REAL PARTY IN INTEREST, TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

(1) Whether it violates the Supremacy Clause for a State Court to order a minor rape victim to submit to a penetrating pelvic examination, where the Court lacks constitutional authority to issue such an Order and the minor victim has a federal constitutional right to refuse to submit?

(2) Whether it violates the Due Process Clause for a State Court to order a child rape victim to submit to a penetrating pelvic examination at the behest of a criminal defendant?

---

* There are obvious redundancies in the QUESTIONS PRESENTED posited by the Petitioner. Questions 1 and 2 are simply "different sides of the same coin." The issue is whether a State Court may ORDER a physical examination of a complaining witness in a rape prosecution after the accused has demonstrated a "compelling need" for the evidence. State Courts are empowered by West Virginia law to enter such Orders. Is there a conflicting federal right that preempts the State's prerogatives? That is the issue here. The Petitioner's formulation of Questions 1 and 2 already adjudge Jason Wilson guilty of the rape. There has been no Trial and no conviction and Mr. Wilson carries with him the presumption of innocence throughout these proceedings [*In Re: Winship*, 397 U.S. 358, 363 (1970)].

PARTIES TO THE PROCEEDING

Jason Wilson is a criminal defendant in the action pending below. There are no parties affected by this Petition other than those identified in the Petition for a Writ of Certiorari.

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STATEMENT OF THE CASE

Jason Wilson stands charged in the Circuit Court of Mercer County, West Virginia with four [4] counts of sexual assault in the first degree and one [1] count of incest. He faces 70-160 years in the West Virginia Penitentiary relating to allegations made by his younger sister, "J.W." [W.Va. Code § 61-8B-3; 61-8-12], if convicted.

Jason Wilson's court appointed counsel filed a Motion for Discovery in the Circuit Court of Mercer County requesting that "J.W.," now 15 years of age, undergo a physical examination by a Board certified female gynecologist for the purposes of determining whether there was any evidence of repeated traumatic sexual intercourse, as now alleged by the State of West Virginia. The request was made under the authority of the West Virginia Supreme Court of Appeals' decision in *State v. Delaney*, 417 S.E.2d 903 (W.Va. 1992), which invests the defendant with the right to discover such evidence and to have the Court order such an examination where the accused can satisfy the 6-factor "COMPELLING NEED test."

Jason Wilson had been inducted into the United States Army and was days away from completing basic training when he was arrested on an Indictment alleging four [4] counts of sexual assault and one [1] count of incest. The Indictment is based solely on the uncorroborated testimony of his younger sister, "J.W.," who is now 15 years of age. "J.W." has made allegations to the State of West Virginia's forensic

expert [a play therapist] that Jason had repeatedly and sometimes forcibly raped her from age 6 through 12. In her revised account, "J.W." indicated that the attacks began when the family lived in Arizona and continued through the family's many moves until they ended up living on Cumberland Road and Union Street in Bluefield, Mercer County, West Virginia.

"J.W.'s" description of what had occurred between her and her brother changed markedly from that she had revealed to other professionals before the referral to the State's forensic play therapist.

"J.W." was examined by Dr. Farid Hussainn, M.D., of the Prudich Medical Center in Montcalm, West Virginia on August 16, 2005. This examination was part of the Mercer County Board of Education's efforts to have "J.W." reintroduced to the formal education system over the objection of her father, who had been home-schooling the child. Part of the examination dealt with questions relating to whether she had ever been molested, abused or penetrated. Her responses to Dr. Hussainn were all in the negative.

"J.W." did evidence signs of Attention Deficit Disorder and she was referred to Lawrence Richmond, a licensed psychologist with Laurel Ridge Psychiatric Associates. During that evaluation, her father, who was present, first reported that she had told him that she had been sexually molested and abused by her brother, Jason, who had left the family and married, against the wishes of his father. The

evaluator recommended counseling by a female counselor, but "J.W.'s" father refused that option.

Mr. Richmond continued to see "J.W." over several visits, in a professional capacity, and "J.W." denied, during those examinations and treatment, that she had ever been sexually penetrated by her brother. She described several touching incidents by the accused, but specifically denied sexual penetration or intercourse. "J.W." also reported to the psychologist some abnormal behaviors within the family, including a female friend of the father who had told "J.W." that she would be raped and killed and chopped up in pieces at some point in her life [she was 7 at the time of this disclosure]. "J.W." also talked about witnessing this same female friend of her father's sexually molesting her then 12-year-old brother [Jason Wilson] when they were living in Arizona.

Psychologist Richmond was a mandatory reporter and made referral to the appropriate authorities. "J.W." was then interviewed by Sergeant Melissa Clemons of the West Virginia State Police on January 13, 2006. Sergeant Clemons specializes in investigating and prosecuting sexual offenses against children. During her interview of "J.W.," "J.W." specifically denied she had ever had sexual intercourse or ever been sexually penetrated by her brother, Jason Wilson. She reported several incidents of being touched inappropriately over the course of the families' many moves.

Jason Wilson eventually gave a statement to Sergeant Clemons. He admitted touching his sister and one incident of digital penetration of her when they were living on Union Street in Bluefield, West Virginia. Both "J.W." and Jason would have been under age during this time period. None of the other children reported ever witnessing any untoward behavior directed at "J.W." by either her father or by her brother, Jason Wilson.

No charges were brought against Jason Wilson based on these statements. The Indictment actually was brought two [2] years later after Jason Wilson was inducted into the United States Army and after "J.W." participated in "play therapy sessions" with Phyllis Hasty, who has been a member of the State's prosecution team for sexual molestation cases in Mercer County for some time.

It was well into those sessions, which occurred over many months, that "J.W." changed her accounts of her interactions with her brother and now alleged repeated sexual intercourse of a forcible and traumatic nature spanning six [6] years and encompassing activities in several States.

The State of West Virginia did not proceed against Jason Wilson based on "J.W.'s" report to either the psychologist or its investigator, Sergeant Clemons – an account that matched what Jason had stated happened in an independent statement he had given to Sergeant Clemons. Rather, the State indicted based on the revised accounts of "J.W." two years

later where she now alleged that she had been repeatedly and forcibly raped from age 6 through 12 by her brother.

Jason Wilson, through counsel, moved, under the authority of *State v. Delaney*, 417 S.E.2d 903 (W.Va. 1992), for an Order requiring a physical examination by a Court-designated, female gynecologist to determine whether hymen injury was present.

The Trial Court considered the age of the accuser, now age 15 [the child in *Delaney* was 7-8]; the limited nature of the exam; the fact that such exams are routinely done in sexual assault cases, often at the insistence of the Prosecution; and the fact that the literature shows no significant psychological damage or risk for young women in "J.W.'s" age group [age 15].

After weighing the *Delaney* factors, the Trial Court granted the defense's request, but established very strict guidelines to minimize the intrusion to "J.W.":

The examination would be limited to assessing hymen injury. It would be done by a female gynecologist approved by the Prosecution and scheduled by the Prosecution. The results would be submitted to the Trial Court for an *in camera* review. The results would only be disclosed if the Trial Court believed the results probative to a claim by the defense or an element of proof for the prosecution.

The Prosecuting Attorney sought a Writ of Prohibition with the West Virginia Supreme Court of

Appeals to prevent the physical examination from taking place. The State's application, after briefing and oral argument, was denied, with the Supreme Court of Appeals upholding the Trial Court's finding of "compelling need" for a physical examination of this 15-year-old female.

"J.W." is now challenging the West Virginia Supreme Court of Appeals' ORDER, raising for the first time before this Court, arguments that were never made either to the Trial Court or the Supreme Court. It is for this Court to determine whether the Constitutional issues now raised were so enmeshed with the arguments below they were effectively preserved. *Taylor v. Illinois*, 484 U.S. 400, 406 n. 9 (1988); *see, also, Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

REASONS FOR DENYING THE WRIT

(1) West Virginia fully protects the young woman's federal rights against an "unreasonable search" by requiring a showing of "compelling need" to the satisfaction of a judicial officer before a minor may be ordered to undergo a physical examination. This "compelling need" standard fully protects the only federal right at issue – namely, the Fourth Amendment protection against an unreasonable search.

The United States Supreme Court has never ruled that physical examinations are per se

unconstitutional. The contrary is true! The Court has held that physical searches, physical examinations and even the removal of body fluids do not conflict with constitutional protections so long as the Fourth Amendment requirements are satisfied. *Schmerber v. California*, 384 U.S. 757 (1966). *See, also, Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 622 (1989); *United States v. Ward*, 131 F.3d 335 (3rd Cir. 1997) (the Violence Against Women's Act's provisions authorizing the forced HIV testing of inmates does not violate Fourth Amendment). The required constitutional limitations simply means that there must be a finding of probable cause by an independent judicial official in order to undertake "a search of a person" or to order physical examinations or other intrusions. *Id.*

Nor is testing limited to persons under reasonable suspicion of committing a crime. "Special needs" may arise beyond the normal needs of law enforcement that justify intrusive examinations. *See, Skinner*, 489 U.S. at 619.

West Virginia fully follows the requirements of the Fourth Amendment when it empowers judicial officers to compel minors to undergo either physical or psychological examinations.

West Virginia's Child Protective Services, by statute, may forcibly take children to a physician or hospital for necessary treatment, even over the objection of the parent or guardian of the child [W.Va. Code § 49-6-9]. To exercise this authority of forced

medical treatment over a child, the State must demonstrate probable cause upon application to a judicial authority that indicates the child is either in danger or his/her needs are being neglected or ignored.

The State of West Virginia additionally empowers its Courts, in investigations of sexual abuse, molestation or assault, to order a physical examination of a minor child to aid or assist in determining whether the abuse has occurred and to assist in advancing the prosecution of the abuser [W.Va. Code § 49-6-4(b)]. This power may only be exercised upon a showing of probable cause before a judicial officer who may, then, order the examination.

The notion that physical examinations of children is especially offensive to society's sensibilities or some specific provision of the United States Constitution is plainly wrong. Many times these examinations are undertaken for the purposes of protecting the minor or vindicating some societal interest in assuring abusers and attackers are identified and prosecuted. *See*, W.Va. Code §§ 49-6-4(b); 49-6-9; 49-6-10. West Virginia is free to include "protecting the due process rights of an accused under State law" among the reasons these examinations will be permitted. *Cf., Malloy v. Hogan*, 84 S. Ct. 1489 (1964); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (W.Va. 2000) (State may provide greater protections to an accused than required by the United States Constitution).

Even though the intrusion on the child being examined is the same – no matter the applicant – the State of West Virginia strictly and stringently limits the circumstances in which a criminal defendant may obtain a Court Order requiring a physical examination of a minor. The lesser "probable cause" standard when the State is the applicant has been discarded. Instead, the State requires the defendant to show "compelling need" under the 6-factor test the Supreme Court of Appeals outlined in *State v. Delaney*, 417 S.E.2d 903. In the case at bar, not only did an independent judicial officer in the form of the Trial Judge rule that the defendant had met the burden of showing "compelling need," but the West Virginia Supreme Court of Appeals affirmed the decision after full briefing and oral argument.

Schmerber requires a demonstration of probable cause before a physical examination may be ordered to vindicate the examinee's Fourth Amendment rights. The more demanding "compelling need test" imposes upon the criminal defendant a far greater burden of persuasion than the State of West Virginia requires of itself when it or its agencies is the applicant for such a test and more than satisfies *Schmerber's* requirements. To prevail on a Supremacy Clause challenge, "J.W." must first identify what federal right and State Enactment are in conflict. *Perez v. Campbell*, 402 U.S. 637, 644 (1971). She has failed this threshold requirement.

(2) The State of West Virginia reserves to itself the authority to order physical examinations of rape victims upon a showing of probable cause. The State extends this right to a criminal defendant in extremely limited circumstances where it is determined to the satisfaction of judicial authority that there is a "compelling need" for such an examination. The State of West Virginia is free to confer upon a defendant greater discovery rights under its own rules and own Constitution than that available to a criminal defendant under the United States Constitution.

West Virginia is not alone in permitting, in certain circumstances, the defendant to be the initiator of a request for a physical examination of a complaining witness. *See, e.g., State v. McIntosh*, 58 P.3d 716 (Ks. 2002); *State v. Barone*, 852 S.W.2d 216 (Tn. 1993); *State v. Ramos*, 553 A.2d 1059 (R.I. 1989); *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1988); *State v. Garrett*, 384 N.W.2d 617 (Mn. 1986); *State v. Drab*, 546 So.2d 54 (Fl. App. 1989); *People v. Nokes*, 228 Cal. Rptr. 119 (1986); *State v. Hewett*, 376 S.E.2d 467, 472 (N.C. 1989). State Courts have adopted a number of approaches to determine whether and under what circumstances an accused sex offender may be entitled to a physical examination of his accuser. Some States apply the "material assistance inquiry" which requires a physical examination when it could lead to evidence of material assistance to the defendant. *See, Turner v. Commonwealth*, 767 S.W.2d

557 (Ky. 1988). The most common approach is that followed by West Virginia, namely, the "compelling need" inquiry, which basically balances the defendant's interest in the evidence against the burden of the examination imposed upon the complainant. *State v. Delaney, supra*; *People v. Glover*, 273 N.E.2d 367 (Ill. 1971); *State v. Garrett*, 384 N.W.2d 617 (Mn. App. Ct. 1986); *People v. Wheeler*, 575 N.E.2d 1326 (Ill. 1991); *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003). Still other States permit an examination under a "medically-deficient standard" which permits an examination only if the Prosecutor's examination failed to conform to proper medical procedures. *State v. Drab*, 546 So.2d 54 (Fl. App. 1989). At least one Court has applied a strict *Brady v. Maryland*, 373 U.S. 83 (1963) standard, meaning the defendant would be entitled to the examination only when the evidence likely to be obtained from such an examination would absolutely bar his conviction. *See, e.g., People v. Nokes*, 228 Cal. Rptr. 119 (1986).

Some other States have held that there are no circumstances in which a criminal defendant could ever obtain an Order requiring a victim to submit to a physical examination, *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 144-45 (Tx. App. Ct. 1987); *People v. Lopez*, 800 N.E.2d 1211 (Ill. 2003); *Clark v. Commonwealth*, 551 S.E.2d 642 (Va. 2001), absent some direct legislative authority. *Id.*

The "federal interest" in State-ordered physical examinations is limited to the Fourth Amendment concerns relating to an unreasonable search. *See, e.g.*,

Schmerber, supra. The States are experimenting with various approaches to the issue – which is both the genius and sometimes frustration of the Federal System envisioned by the Founders. Some defendants have a right to discover and verify the medical evidence against them and others, in different jurisdictions, do not. A fair Trial, consequently, may mean different things in the several States even though the accused's conduct is the same.

The States' experimentations in this field, however, have always applied standards that honor the constitutional protection of the person being examined against unreasonable search. All the States that are permitting such examinations require a showing to the satisfaction of a judicial officer under standards that are at least as strict and most of the time far more strict than the probable cause standard that forms the heart of the protection outlined in the Fourth Amendment.

The fact that the United States Constitution may not provide Jason Wilson a right to insist upon a physical examination of his accuser does not eliminate the State of West Virginia's power to honor such a request and set standards for such a request. Typically, the operation of the System of Criminal Justice within a State is left to the prerogative of the State so long as the minimum requirements of the United States Constitution are satisfied. The United States Supreme Court has consistently held that Congress cannot reach matters constitutionally reserved to local authorities. The regulation and

punishment of intra-State violence has always, in our Federal System, been the province of the States. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The provisions of State law or the State Constitution may, in certain circumstances, provide higher standards of protection for the accused than afforded by the United States Constitution. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121 (1959). *See, also, Syl. Pt. 1, State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (W.Va. 2000); *Syl. Pt. 2, Pauley v. Kelley*, 162 W.Va. 672, 255 S.E.2d 859 (1979); *see, also, People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 828 (1992).

West Virginia, like many other States, has decided that, in very limited circumstances, a defendant may initiate a request for a Court Order requiring a medical examination of his accuser. This "right" of medical examination may not exist under the United States Constitution, but it is certainly within the power of the State to confer such a benefit upon a criminal defendant facing 70-160 years in prison. *Id.*

The limitation on the State's authority to order such an examination only implicates a federal concern when the Fourth Amendment protection against unreasonable searches is trespassed.[1] No such

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[1] A different issue is presented by what happens when an adult, exercising independent judgment, refuses the Order to undergo an examination. This may implicate a different set of concerns or constitutional considerations that are not present

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boundaries were violated by the Supreme Court of West Virginia's decision to authorize an examination in the case of "J.W."

"J.W." is 15 years old. She is in the category of young women who should be undergoing regular gynecological examinations under standards enunciated by the American College of Obstetrics & Gynecologists. The examination is to be done by a Board certified female gynecologist in conformance with all medical protocols. The type of examination undertaken is one universally experienced by women in America whether they are victims of sexual assault or simply undergoing routine periodic medical examinations. The results of the examination are disclosed only to the judicial officer who authorized

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here. The Legislature of the State of West Virginia has stated, in a related context, that a refusal to undergo a physical examination should not result in a "contempt finding." [W.Va. Code § 49-6-4(a)]. Courts that have confronted the issue have fashioned remedies short of actually punishing the person refusing the examination and preferring, instead, to make evidentiary adjustments that balance the playing field, such as striking portions of the State's case that involve the claim of sexual intercourse. *See, People v. Wheeler, supra.* What "might happen" to an individual who refuses a Court Order requiring a medical examination in the context of this type of case does not present a justiciable issue at this point. The Ripeness Doctrine is designed "to prevent the Courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . ." The Ripeness Doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise that jurisdiction. *Reno v. Catholic Services, Inc.*, 509 U.S. 43, 57 n. 18 (1993).

the test, *in camera,* and will only be released if the examination reveals evidence that is probative on an element of the State's case or a claim of defense by the accused. Finally, the psychological evidence presented to the Trial Court showed that the fears of mental damage in "J.W.'s" age group are unfounded.

One may argue allowing medical examinations is not sound policy. That is a fair issue for debate. But the judicial process is not the system in which policy is established. This Court's sole concern is whether there has been a violation of a specific and articulated federal right by the Order of the highest Court of West Virginia requiring a physical examination. The answer is in the negative. The "compelling need" test applied by the Trial Court and affirmed by the West Virginia Supreme Court of Appeals more than satisfies any federal concern about an unreasonable search. The State of West Virginia's highest Court has authorized the examination and, even though the defendant may not have had a right to insist upon that examination under the United States Constitution, the State of West Virginia was free to grant him greater protection than that afforded by the Federal Constitution before subjecting him to a lengthy term of imprisonment in its prisons.

(3) West Virginia's decision to order a physical examination of a 15-year-old by a Board certified female gynecologist does not conflict with any articulated federal policy and, instead, actually advances a federal preference for forensic medical evaluations in cases of sexual abuse or sexual assault.

There was nothing sinister or inherently dangerous about the examination ordered by the Trial Court in the case of "J.W." She is 15. The psychological evidence introduced for the Trial Court indicates that females who undergo gynecological examinations in this age group had no permanent, untoward, psychological effects. The examination, moreover, was to be done in accordance with all medical standards by a Board certified gynecologist, selected by the State of West Virginia. The report of the examination is to be given only to the Trial Court so it can assess and determine whether the results of the examination are probative to any issue or element of proof required of the State or any claim of defense of the accused. There will be no tissue samples taken; no blood drawn; and no invasive procedures outside the normal gynecological examination that are almost routinely and universally undergone by sexual assault victims and non-sexual assault female members of our community over their lifetime.[2]

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[2] The American College of Obstetricians & Gynecologists recommend that young women, beginning at age 13-15, undergo

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The Supremacy Clause of the United States Constitution, Article IV, Section 2, has not been violated by the Order of the West Virginia Supreme Court of Appeals requiring the Prosecutor to undertake a physical examination of the complaining witness in this rape prosecution. There simply is no conflicting federal statute or policy that prohibits such examinations. *See, Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (standards articulated for when preemption is required). The Violence Against Women's Act of 1994 [VAWA][3] actually is designed to encourage, not discourage, forensic medical evaluations of sexual assault victims for the purposes of strengthening their position in Court. The VAWA accomplishes this by providing the States with a set of incentives so that those States will enact laws that authorize enhanced training for medical providers in performing forensic medical examinations of sexual assault victims, including children, and for providing

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pelvic examinations. This same entity also has a hard and fast rule that sexually active females should have pap smears within three [3] years of the time intercourse was first experienced. "J.W." indicates that she first experienced intercourse at age 6. She is now age 15 and by the admission of the prosecution, her family has never had her physically examined for injury, venereal disease or any of the risk factors for cancer of the cervix.

[3] Pub. L. 103-322, 108 Stat. 1902 (1994). The United States Justice Department, in implementing VAWA, awards STOP [Services, Training, Officers, Prosecution] grants to the States. Among the preconditions for the receipt of the monies is a guarantee the State has a Program of providing free forensic medical examinations to all alleged victims.

funding sources so that these forensic medical evaluations can go forward.

West Virginia is among those States that has enacted provisions implementing the federal policy enunciated in the VAWA. The State has created a training program for medical personnel to educate them as to the method and means of undertaking forensic medical evaluations of alleged victims of sexual assault or sexual abuse. The State furthermore has imposed upon the Prosecuting Attorneys' Institute a mandatory duty to pay for all forensic medical evaluations in cases where sexual assault is suspected or claimed [W.Va. Code § 61-8B-15, 16]. The enunciated federal policy is to encourage forensic medical examination as a method and means of taking these cases out of the iffy "he said/she said sphere"[4] and providing corroborative medical evidence. These interests are actually advanced by the Trial Court's ORDER at issue here.

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[4] A "he said/she said" case carries a substantial risk of error. A well-spoken, composed person may be telling a lie. An inarticulate, frightened witness may be telling the truth, yet come across as incredible. Forensic medical evidence serves the truth-finding mission of the jury and removes the specter that justice will be decided based on the vagaries of the better performer.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this the 20th day of September, 2009.

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